THE HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY

WRIT PETITION No. 18936 of 1995

Dated: 21.11.2006

Between:

O. Srinivas

… Petitioner

AND

Government of India, rep., by its
Brigadier Commandant, Headquarters,
1 EME Centre, Secunderabad & others.

… Respondents

THE HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY

WRIT PETITION No.18936 of 1995

ORDER:-

The petitioner in this writ petition has questioned the action of the respondents in discharging him from the Indian Army.

The averments in the affidavit briefly stated are as under:

The petitioner appeared for selections for recruitment of soldiers held at Yanam in the month of December 1992. He passed the physical test conducted by the officers of the respondents and after passing the physical test, he was asked to appear for medical test at Visakhapatnam, which he had also passed. The petitioner having reported at Headquarters 1 EME Centre, Secunderabad on 22.12.1992, his name was enrolled with Ex.No.144618300 K Rect/VM(AFV). The petitioner received basic training, which he successfully completed by 15th May 1993. After completion of the basic training, he was directed to undergo technical training in vehicle mechanic trade for 24 weeks at headquarters and he completed it successfully.

While the petitioner was undergoing the basic training at 1 TRG Battalion, he fell down from vertical rope and since then the blood was coming from his mouth while running. In the month of

January 1994, Battle Physical Efficiency Test (BPET) was conducted. The said test consists of two tests viz., (1) ground test and (2) 5 km running with riffle. The petitioner passed the ground test, but he could not pass the running test due to bleeding and breathlessness. Immediately, the petitioner approached R.M.O.,
1 EME Centre, Secunderabad for medical checkup. On 05.03.1994, 09.03.1994, 18.03.1994 and 19.03.1994 he was referred to a cardiologist for opinion and advise. The concerned cardiologist did not checkup and give advise. On 14.04.1994, the petitioner was directed to appear for BPET. In the said test, he failed with respect to the running test on account of the same problem viz., bleeding and breathlessness. Again, the petitioner approached the cardiology (O.P.D.) on 29.06.1994 and got himself examined. The cardiologist advised the petitioner to get E.C.G.,
X-ray and other tests and gave his reports after examining the test results. Though the petitioner approached the R.M.O. for proper advice, he did not give any such advise and failed to treat him properly.

The petitioner received a show cause notice from the 1st respondent on 31.07.1994 stating that he failed in the BPET and he was asked to show cause as to why his services shall not be terminated on the ground that he is unlikely to become an efficient soldier in terms of Army Rule 13 para 3(iv). The petitioner gave a reply on 08.08.1994 wherein he pointed out to his health problem and he requested the 1st respondent to give some more time for passing the running test in BPET. Without considering the said explanation, the 1st respondent discharged the petitioner on 30.09.1994 and highhandedly sent him out by giving a railway ticket. On reaching his

native place, the petitioner got issued a lawyer's notice on 22.12.1994 requesting the 1st respondent to reconsider his decision and on 25.02.1995 the petitioner received reply from the respondents whereunder his request was rejected. The petitioner pleads that his discharge is in violation of Section 23 of the Army Act, which envisages that furnishing of a certificate of termination of service to the employee is mandatory and that Rule 12, which is also to the similar effect is violated as the discharge order was not furnished to the petitioner. The petitioner specifically pleaded that there are instances of failure of the candidates in BPET on more than 8 to 10 times and they were given many opportunities to get through BPET, but, however, the petitioner was given only three chances.

The 2nd respondent filed a counter-affidavit wherein the material allegations were denied. The petitioner after failing the BPET on 14.04.1994, reported to the cardiologist on 29.06.1994 with a gap of 2 ½ months. The allegation that the cardiologist refused to see the petitioner was denied. It is stated that the petitioner was given two warning letters to clear the BPET and a show cause notice dated 31.07.1994. According to the respondents, passing of the BPET is an essential requirement for a soldier and since he has not passed the BPET, he was discharged from the service under Army Rule 13 para 3(iv). According to the respondents, as per the instructions issued by the Headquarters,

1 EME Centre, Secunderabad vide letter dated 28.10.1993 as amended from time to time, only three chances of passing of the BPET are being given to the recruits for the test and that the petitioner was given one more chance to pass the BPET on 08.06.1994. The allegation that the petitioner was given only three chances was

denied.

I have heard Sri Karanam Ramesh, learned counsel for the petitioner and Sri A. Rajashekar Reddy, learned Assistant Solicitor General for the respondents. I have also perused the pleadings and record.

There are certain facts which are undisputed viz., the petitioner failed in the running test, which is a part of BPET; the petitioner was discharged on that count and a copy of the discharge order was not served on the petitioner. It is also not in dispute that before discharging the petitioner, a show cause notice was given vide letter No.20714/TRG/TCC dated 31.07.1994. In the said show cause notice, it is mentioned that the petitioner has been consistently failing in BPET despite warning given to him and that the petitioner failed in BPET conducted on 15.01.1994, 12.03.1994, 14.04.1994 and 08.06.1994. Petitioner was therefore called upon to intimate why his services should not be terminated on the ground that he is "*unlikely to become an efficient soldier"* in terms of Army Rule 13 para 3(iv). The petitioner was asked to submit his reply within ten days of receipt of the show cause notice. On 08.08.1994, the petitioner gave a reply whereunder he has stated that he has passed all the tests except 5 km running test in BPET. He further stated that during the basic training at 1 TRG Battalion, he fell down from vertical rope and since then blood was coming from his mouth while running. Though medical checkups were carried out on the petitioner, the doctors have not detected the cause so far. For those reasons, the petitioner requested the 2nd respondent to give a little more time while assuring him that he will pass the running test. He also pleaded that he had a large family consisting of father, mother, two elder brothers and one unmarried younger sister,

who are fully depending upon him and that he was the only the earning member in the family. This explanation, the receipt of which is not denied, does not appear to have been considered by the respondents before the petitioner was discharged. The record produced before me shows that on 10.09.1994, Br Commander prepared proceedings with the title *DISCHARGE OF A RECRUIT AS UNLIKELY TO BECOME AN EFFICIENT SOLDIER/ON DISCIPLINARY GROUNDS*. On 14.09.1994, the Chief Instructor, to whom the file was sent, made the following remarks:

> "No 14618300X Rect/VM(AFV) O. Srinivas has failed in 5 kms run which forms mandatory Battle Physical Efficiency Test for rects. The individual was given three chances to clear the test with adequate time between each test and given rigorous practice to clear the test. No. 14618300X Rect/VM(AFV) O.Srinivas has failed to qualify the test and his discharge from service on the grounds "unlikely to become an efficient soldier" is recommended."

On 19.09.1994, order was passed by the 2nd respondent discharging the petitioner with effect from 01.10.1994. There is nothing on record to show that before discharging the petitioner, his explanation was taken into consideration. Record also does not reveal that the petitioner was served with the order of discharge. None of the pleas raised by the petitioner in his explanation have been taken into consideration by the respondents before he was discharged from service. In the legal notice dated 22.12.1994, it was categorically stated that there were instances where the candidates were given more than 6 to 8 chances to pass the BPET. In the reply of the respondents, the allegation that the others were given 6 to 8 chances was not denied. The only ground on which the discharge order was

sought to be justified was that the petitioner could not clear the minimum essential endurance test despite extensive additional training given to him and that he did not receive any injury during the training. In the counter-affidavit filed by the respondents, the specific allegation that 8 to 10 chances were given to some candidates is not denied.

From an examination of the facts of the case, I am of the view that the respondents have acted in the most arbitrary manner in dealing with the petitioner. Though an explanation was called for and was received, it was not dealt with in the discharge order. It is therefore, reasonable to presume that the respondents were not in a position to deny the contents of the explanation. The principle of audi alteram partem, which is the basic facet of Principles of Natural justice and which has taken its ground in the epoch making case decided by the House of Lords in **RIDGE v BALDWIN**[1] is being consistently followed by Courts in India (please see **STATE OF ORISSA v (Miss) BINAPANI DEVI**[2] and **SWADESHI COTTON MILLS v UNION OF INDIA**[3]). This basic principle postulates that before passing any order against a person, which is likely to result in adverse civil consequences, he is required to be heard. This requirement is held to be followed as much by the administrative bodies as by the judicial and quasi-judicial fora. The requirement of hearing does not end with merely calling for an explanation. The explanation received shall be considered and reasons be given for rejecting the explanation as it is also well settled that the requirement of giving reasons is also a facet of Principles of Natural justice.

In the instant case, the respondents violated these two facets of

Principles of Natural justice. Having called for an explanation, they failed to consider the same and give reasons for rejecting the petitioner's explanation. In my considered view, the order of discharge suffers from violation of these two basic principles of natural justice apart from the vice of arbitrariness. Arbitrariness, for, having received the explanation, they have ignored the same and arbitrarily discharged the petitioner. The respondents failed to deny both in the reply notice and in the counter that a number of chances viz., as many as 8 to 10 were given to many other people for passing the BPET, while the petitioner was denied the similar benefit. From the non-denial of this allegation, it is reasonable to presume that the respondents have indulged in invidious discrimination by applying a different yardstick to the petitioner.

Though in the counter-affidavit the respondents sought to rely upon the instructions given by the Headquarters, 1 EME Centre, Secunderabad in letter No.301/P/TRG/TCC dated 28.10.1993 to the effect that only three chances of passing BPET test were being given to the recruits, in the very same counter they stated that the petitioner was given four chances. This itself shows that the so called instructions which are not even placed before me are not inviolable. In any event as the respondents failed to deny the specific allegation that number of chances were given to many other candidates to pass BPET, the said instructions cannot be considered sacrosanct, validating the arbitrary action of the respondent. The arbitrariness of the respondents is further evident from the fact that the petitioner was not even served with a copy of the discharge order. Failure on the part of the respondents to deal with the stand of the petitioner that as he had suffered injury during the training, he was unable to pass the 5 km

running test, in the impugned discharge order, in my considered opinion, further invalidates the order. One would not have known whether if what the petitioner had claimed to be true (in the absence of contemporaneous denial by the respondent) if he had received a proper treatment, he would have passed the test, given a reasonable time.

Viewed from any angle, the impugned order of discharge, in my view, cannot be sustained. Hence, I am inclined to set aside the said order.

Coming to the relief to be granted to the petitioner, at the time of discharge, the petitioner was aged about 24 years. But for his discharge, the petitioner would have served the army for a minimum period of 15 years as given out by Sri A.Rajasekhar Reddy in reply to the query put to him by the Court. Petitioner is thus denied a decent employment at the prime of his life thereby putting him and his family members to untold hardship. Since already 11 years had elapsed from the time of his discharge and the post in which the petitioner was working was in army which requires absolute fitness, I am not inclined to direct the petitioner's reinstatement. Instead, I deem it proper and appropriate to direct the respondents to pay the petitioner some reasonable amount in lieu of reinstatement. I therefore direct the respondents to pay the petitioner a sum of Rs.2,00,000/- as compensation for the unlawful discharge of the petitioner, though I am convinced that the said amount hardly recompenses the petitioner for the monetary loss he had suffered due to deprivation of employment at a young age of 24 years. The said amount is directed to be paid within a period of two months from the date of receipt of a copy of this order.

Subject to the above direction, the writ petition is disposed of.

No costs.

C.V. NAGARJUNA REDDY, J

Date: 21.11.2006
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[1] 1964 AC 40

[2] AIR 1967 SC 1269

[3] 1981 SC 818